BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF PETROLEUM RECLAIMING SERVICES, INC., Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 84-1 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of a $5,000 civil penalty for a discharge of oil allegedly in violation of RCW 90.48.350, came on for hearing before the Pollution Control Hearings Board, Gayle Rothrock and Lawrence J. Faulk, Members, convened at Lacey, Washington, on March 8, 1984. Administrative Appeals Judge William A. Harrison presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Appellant appeared by its attorney Annon W. May. Respondent appeared by Charles W. Lean, Assistant Attorney General. Reporter Kim L. Otis recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. From testimony heard and exhibits examined, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

Appellant Petroleum Reclaiming Services, Inc., owns and operates a waste-oil recycling facility in Tacoma.

II

On August 5, 1983, a Friday, the facility was unattended except by a gate guard. All other persons who work at the facility were on vacation. On that date a truck driver employed by appellant arrived at the facility with a load of waste oil. Acting on appellant's orders, the guard admitted the truck driver so that the waste oil could be delivered to a tank at the facility.

III

The driver made his delivery. Then, though untrained in the workings of the pipes and valves within the facility, he proceeded to open a sequence of valves. They were the wrong valves. As a consequence, "tank bottom water" containing oil began flowing from the facility into the Tacoma municipal sewer. During the course of the day, 1700-2100 gallons of tank bottom water was so discharged from appellant's facility.

IV

Once within the sewer, appellant's oil-laden discharge flowed into the City of Tacoma's sewage treatment plant where it was detected.

Enroute to the sewage treatment plant, some of the discharge had become trapped at a pump station. That quantity mixed with sewage, was removed by the City at a cost of $1,005.

V

Appellant's discharge could not physically be barred from the sewage treatment plant without backing up all sewage inflow. Neither could the oil be removed at the plant. Tacoma has a municipal ordinance prohibiting more than minimal amounts (50 parts per million) of fats, oil or grease from entering its sewer.

VI

Appellant's discharge flowed through the sewage treatment plant and entered the Puyallup River at a point approximately a mile and one-half upstream of Commencement Bay. The oil within the appellant's discharge was of such quantity as to block half the River's width for a great distance downstream.

VII

A representative of the city sewer utility traced the oil discharge upstream until he found the source--a discharge pipe at appellant's facility. He requested of the guard that the valve be closed, which it was. However, the oil discharge to the Puyallup River lasted from about 10:00 a.m. to 4:00 p.m. during the day in question. The City, rather than appellant, notified DOE.

VIII

Appellant has made significant discharges of oil or other reclaimed waste to the City sewer on four prior occasions:

1. March 3, 1980: Oil in sufficient quantity to create a sheen on the sedimentation tanks of the City sewage treatment plant, cost to City: unknown.

2. May 15, 1981: Oil, about 1,000 gallons, cost to City: $2,900.

3. April 12 and 13, 1982: Vanillin (resulting from appellant's treatment of a combination of vanillin and Bunker "C" fuel). The vanillin used up chlorine at the sewage treatment plant intended to kill the bacteria in sewage with the result that the bacteria were not killed, cost to City: $308.

4. June 17, 1983: Oil, in sufficient quantity to discolor the influent entering the sewage treatment plant, cost to City: unknown.

Moreover, relative to the requirement of the Tacoma municipal ordinance prohibiting any discharge to the sewers containing more than 50 parts per million of fats, oil or grease appellant's discharges have been as follows on the dates shown:

Date	Fats, oil or grease in parts per million
04/27/82	672
06/01/82	1253
06/02/82	976
06/03/82	697
12/14/82	235
12/15/82	454
12/16/82	365
01/26/83	805
01/27/83	3046
01/28/83	41
07/13/83	107
07/14/83	1236
07/15/83	554
01/13/84	70

IX

Following the incident in question, appellant changed the valve handle which controls discharge to the sewer to prevent its use by any but an assigned operator. It also changed procedures to have a trained plant operator on duty during deliveries.

X

By notice dated November 2, 1983, DOE assessed a civil penalty of $5,000 under RCW 90.48.350 against appellant. The notice cited violation of RCW 90.48.320 relating to discharge of oil to waters of the state and RCW 90.48.360 relating to a duty of the discharger to notify DOE of a discharge of oil. Appellant applied to DOE for relief from penalty which was denied by notice dated December 20, 1983. Appellant appealed to this Board on January 3, 1984.

XI

Any Conclusion of Law which should be deemed a Finding of Fact is hereb adopted as such.

From these Findings of Fact the Board comes to these

CONCLUSIONS OF LAW

I

The Water Pollution Control Act, at RCW 90.48.350 states, in relevant part:

> Any person who intentionally or negligently discharges oil, or causes or permits the entry of the same, shall incur, in addition to any other penalty as provided by law, [see RCW 90.48.144, 90.48.080 and 90.48.320] a penalty in the amount of up to twenty thousand dollars for every such violation; said amount to be determined by the director of the

> commission [succeeded by DOE] after taking into consideration the gravity of the violation, the previous record of the violator in complying, or failing to comply, with the provisions of chapter 90.48 RCW, and such other considerations as the director [DOE] deems appropriate. Every act of commission or omission which procures, aids or abets in the violation shall be considered a violation under the provisions of this section and subject to the penalty herein provided for. [Brackets added.]

II

Negligence. Negligence is the failure to exercise ordinary care.[1] In opening valves which he was not trained to open, appellant's driver failed to exercise ordinary care and was negligent. His negligence occurred within the scope of his employment and appellant is responsible, as the driver's employer, under the doctrine of respondeat superior. Moreover, it was negligence on behalf of appellant's management personnel to allow deliveries of waste oil by an untrained driver without any trained plant operator in attendance. Appellant is likewise responsible for this negligence under the doctrine of respondeat superior.

III

Cause. Causation, or proximate cause, means a cause which in a direct sequence, unbroken by any new, independent cause, produces the

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1. See System Tank Lines, Inc. v. Dixon, 47 Wn.2d 47, 286 P.2d 704 (1955) and Washington Pattern Jury Instructions (Civil) WPI 10.01:

> Negligence is the failure to exercise ordinary care. It is the doing of some act which a reasonably careful person would not do under the same or similar circumstances or the failure to do something which a reasonably careful person would have done under the same or similar circumstances.

event complained of and without which such event would not have happened.[2] Appellant's negligence directly produced the oil-laden discharge. But for appellant's negligence the discharge would not have occurred. Such negligence was the cause of the discharge in question.

IV

Oil. The "tank bottom water" discharged by appellant constitutes "oil" as that term is defined at RCW 90.48.315(7):

> "Oil" or "oils" shall mean oil, including gasoline, crude oil, fuel oil, diesel oil, lubricating oil, sludge, oil refuse, or any other petroleum related product. (Emphasis added.)

V

Entry. To constitute a violation of RCW 90.48.350, oil must enter waters of the state. See RCW 90.48.320. Appellant's discharge entered "waters of the state" as that term is defined at RCW 90.48.315(10):

> "Waters of the state" shall include lakes, rivers, ponds, streams, inland waters, underground water, salt waters, estuaries, tidal flats, beaches and lands adjoining the seacoast of the state, sewers, and all other surface waters and watercourses within the jurisdiction of the state of Washington. (Emphasis added.)

VI

Appellant negligently discharged oil into waters of the state on August 5, 1983, in violation of RCW 90.58.350.

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2. Washington Pattern Jury Instructions, WPI 15.01.

VII

Amount of penalty. RCW 90.58.350 sets out guidelines for determining the amount of penalty. The first is the gravity of the violation. In this case there was an on-going discharge for approximately six hours which fouled a City sewage treatment plant and half the width of the Puyallup River for a great distance. It necessitated extraordinary expenditures of time and money by the City.

The second statutory guideline for consideration is the previous record of the violator in complying, or failing to comply, with the provisions of chapter 90.48 RCW. The appellant has an established record of one significant oil spill per year for the past four years. These are failures to comply with chapter 90.48 RCW. The present event extends the once-annual tradition developed by appellant into its fifth consecutive year.

The final statutory guideline allows consideration of other factors such as appellant's regular discharges of fats, oil and grease to the Tacoma sewer system in violation of a municipal ordinance, which, in tandem with the State Water Pollution Control Act, exists to preserve state water from oil. Likewise, consideration must be given to appellant's failure to notify DOE of the discharge in question as required by RCW 90.48.360, or to discover the same until informed of it by City personnel.

After application of the statutory guidelines relevant to the determination of penalty under RCW 90.48.350, we conclude that a

$5,000 penalty is amply justified by the evidence. A greater penalty would have been justified had not appellant taken corrective action after the event (see Finding of Fact IX, above).

VIII

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law, the Board enters this

ORDER

The $5,000 civil penalty is affirmed.

DATED this 16th day of May, 1984.

POLLUTION CONTROL HEARINGS BOARD

Gayle Rothrock

GAYLE ROTHROCK, Chairman

Larry Faulk 5/16/84

LAWRENCE J. FAULK, Vice Chairman

William A. Harrison

WILLIAM A. HARRISON
Administrative Appeals Judge